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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 579

UNITED NUCLEAR CORPORATION,
a Delaware Corporation,
Petitioner,

vs.

MOKI OIL & RARE METALS COMPANY,
a New Mexico Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The judgment and opinion of the United States Court of Appeals, Tenth Circuit, reported at.....F. 2d..... (not yet reported), is printed and annexed hereto as Appendix A. The judgment appears at Tr. 4.

JURISDICTION

The judgment and opinion of the United States Court of Appeals, Tenth Circuit, was delivered and entered on July 25, 1966. (Appendix A, hereto) Petitioner's Motion for Stay of Mandate was granted by the United States Court of Appeals, Tenth Circuit, pending application for Writ of Certiorari to this Court on August 22, 1966. The jurisdiction of this Court to review by Writ of Certiorari a final judgment of a cause in a court of appeals is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

The sole question presented is whether the decision and judgment of the United States Court of Appeals, Tenth Circuit, erroneously held the principal place of business of petitioner was not New Mexico and that the United States District Court for the District of New Mexico had diversity jurisdiction over this cause under the provisions of 28 U.S.C. 1332(a)(1), respondent being a citizen of New Mexico.

THE STATUTE INVOLVED

28 U.S.C. 1332 in material part provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different states;
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: . . . "

STATEMENT OF THE CASE

Respondent, a citizen of New Mexico, filed its complaint in the United States District Court for the District of New Mexico against Petitioner and Phillips Petroleum Company, a Delaware corporation with its principal place of business in Oklahoma, and attempted to invoke the jurisdiction of said Court solely on the ground of diversity of citizenship (R. 2). The complaint alleged that petitioner's principal place of business was in New York City (R. 2). An amended complaint stated petitioner's principal place of business was New York *or* Maryland (R. 13).

Petitioner's Answer denied its principal place of business was in New York (R. 9). Petitioner filed its motion (R. 20) and amended motion (R. 47) to dismiss for lack of diversity

jurisdiction, contending its principal place of business was in New Mexico.

The District Court entered its Order on June 2, 1965, overruling petitioner's motion (R. 20) and amended motion (R. 47) to dismiss for lack of diversity jurisdiction. The District Court certified, pursuant to Title 28 U.S.C. Section 1292(b),

> " . . . that it is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order will materially advance the ultimate termination of this litigation. . . ." (R. 53)

The trial Court determined that petitioner's principal place of business was in a state other than New Mexico and that it had diversity jurisdiction of the cause. (Par. 2, R. 53). Petitioner's application for leave for an interlocutory appeal from said order was granted by the United States Court of Appeals, Tenth Circuit, by order filed in the District Court on July 1, 1965 (R. 54, 55). Petitioner filed its Notice of Appeal to Court of Appeals under Rule 73(b) on July 2, 1965. (R. 55)

The Court of Appeals in its opinion in the interlocutory appeal affirmed the trial court's holding that petitioner's principal place of business was not in New Mexico (Appendix A).

The single issue being limited to jurisdiction, and jurisdiction being solely predicated upon claimed diversity of citizenship, the pleadings in their entirety are not included in the record. No question is raised concerning jurisdictional amount. Diversity of citizenship exists between respondent and defendant Phillips Petroleum Company.[1] Petitioner contends its principal place of business is in New Mexico, and the requisite diversity of citizenship is lacking.

The amended complaint may be stated, for the purposes of this Petition, as showing the entire matters in controversy relate to the mining and milling of uranium ores in the Grants,

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[1] Moki is a New Mexico corporation with its principal place of business in New Mexico. Phillips is a Delaware corporation with its principal place of business in Oklahoma (R. 13).

New Mexico area and arise from the purchase by petitioner of uranium mining and milling properties and their subsequent operation in the Grants, New Mexico area.

No testimony was heard by the District Court relating to the issue of petitioner's principal place of business. The Court, in this regard, based its order and findings solely upon affidavits filed by petitioner. (R. 21-46 and R. 47-52), evidence produced by respondent by way of exhibits (R. 56-86) and certain portions of depositions that had been taken in the cause and appear in the record entitled "Narrative of Testimony of Deponents" (R. 86a-96). Respondent did not file any affidavits, or otherwise controvert any of the matters contained in petitioner's affidavits and the factual basis upon which a determination of petitioner's principal place of business must be made is undisputed.

United Nuclear Corporation is engaged in the nuclear industry, and engages in all phases of the business open to private industry.

It has five divisions, geographically separted, each of which is ultimately responsible to the chief executive officer of the corporation whose office is on a farm in Centreville, Maryland.

The Mining and Milling Division operates the uranium mines owned by petitioner in the Grants, New Mexico area and handles petitioner's 65% interest in the Homestake-Sapin Partnership, which owns uranium mines and mills near Grants, New Mexico. The Vice President of the Mining and Milling Division has his offices in Santa Fe, New Mexico.

The Fuels Division maintains a manufacturing facility in New Haven, Connecticut, an assembly plant in Montville, Connecticut, and supervises a cold scrap reprocessing plant in Rhode Island. (The Rhode Island facility was added after the complaint was filed.) It also supervises a Chemical Division, located in Missouri. The Fuels Division is active in nuclear fuel preparation, fabricating and recovery. It is operated under the direction of its Vice President, who maintains an office at New Haven, Connecticut.

The Development Division is operated out of an office in White Plains, New York, and has a facility in White Plains and another in Pawling, New York. It is engaged in nuclear research and development for the United States Government, the development of commercial nuclear power plants for maritime use, for water desalting and small electric generating stations, and other projects involving advanced technology, and has classified contracts with space and defense agencies. It is operated under the direction of a Vice President in charge of Development.

The Chemical Division, located in Missouri, is operated under the direction of the Vice President in charge of the Fuels Division. It maintains a plant in Hematite, Missouri, which processes fuel for reactor cores out of enriched uranium, and for reprocessing scrapped uranium.

The Shielding Division is operated by a wholly-owned subsidiary, Ray Proof Corporation, the plant or office of which is located at Stamford, Connecticut, and is under the direction of the President of such subsidiary. It produces standard industrial products for shielding against X-ray and Gamma radiation, radio frequency vibration, and acoustic interference. (This division has been sold since the filing of the complaint.)

At the time suit was filed, and up to the present time, the chief executive officer, the senior vice president, the financial vice president, and the administrative vice president had their offices on a farm purchased by petitioner in Centreville, Maryland. The Centreville office consists of a farm, with buildings converted to offices, and has two residences for the officers working there. The Court of Appeals characterized this office as petitioner's "hub."

The divisions are organized by the type of activity involved, and this organization does not reflect the unequal magnitude of their operations. The Mining and Milling Division, conducted entirely in New Mexico, accounts for 77.52% of the gross book (original cost) of the corporation, 76.25% of the net book (original cost less depletion and depreciation), 59.88% of

the sales, 96.70% of the profits, 92.61% of the net cash flow, and 87.43% of the contract backlog of the corporation.[2]

The activities of petitioner are summarized as follows:

United Nuclear Corporation Percentages of Various Activities by States[3] Derived From Affidavits
(R. 51-52)

	N.M.	Conn.	N.Y.	Mo.	Md.
1. Gross Book (using 65% Homestake-Sapin Partners)	77.52	13.36	2.98	3.51	2.46
2. Net Book (using 65% Homestake-Sapin Partners)	76.25	14.70	1.92	3.88	3.04
3. Sales (using 65% Homestake-Sapin Partners)	59.88	28.30	9.25	2.57	-0-
4. Profits (using 65% Homestake-Sapin Partners)	96.70	8.91	(1.97)	(3.64)	-0-
5. Net Cash Flow (using 65% Homestake-Sapin Partners)	92.61	6.46	1.40	(.47)	-0-
6. Contract Backlog (using 65% Homestake-Sapin Partners)	87.43	11.35	.68	.54	-0-
7. Employees (using 100% Homestake-Sapin Partners)	43.52	37.28	13.14	5.02	.80
8. Employees (using 65% Homestake-Sapin Partners)	36.52	41.90	14.78	5.64	.90
9. Employees (using U.N.C. controlled Homestake-Sapin Partners)	29.36	46.62	16.44	6.28	1.00
10. Payroll (using 100% Homestake-Sapin Partners)	43.06	34.50	16.56	4.57	.92
11. Payroll (using 65% Homestake-Sapin Partners)	36.30	38.60	18.53	5.12	1.03
12. Payroll (using U.N.C. controlled Homestake-Sapin Partners)	29.48	42.73	20.51	5.66	1.14
13. Acreage (fee) (65% Homestake-Sapin Partners)	51.24	2.77	13.96	1.71	18.26
14. Allocation of General Corporate Expense (Massachusetts Formula)	58.7%	26.7%	10.5%	3.85%	

[2] These figures include petitioner's 65% ownership interest in the Homestake-Sapin Partnership.

[3] Not included are insignificant percentages in Washington, D. C., Alaska, Utah, Colorado, Montana, Rhode Island, Wyoming and Arizona.

The Court of Appeals stated that where a corporation carries on its business in a number of states, no one of which is clearly the state in which its business is principally conducted, the state where a substantial part of its business is transacted and from which centralized general supervision of all of its business is exercised, is the state in which it has its principal place of business. The Court of Appeals stated:

> "However, we think the evidence established that the principal place of business of Nuclear was located in Maryland."

The corporation has no sales, profits, cash flow or contract backlog in Maryland, and its only asset in Maryland, a farm not related to the nuclear business with offices and residences, accounts for 2.46% of the gross book and 3.04% of the net book of the corporation. There are 17 employees in Maryland, 8 to 10 of which are farm hands. (Par. 26, R. 33)

The corporation's Mining and Milling Division employed 255 people in New Mexico, and directly controlled and supervised 173 other workers in New Mexico employed by the Homestake-Sapin Partnership, or a total of 428. (R. 37)

The corporation, as stated by the Court of Appeals, has its executive "hub" or "nerve center" in Maryland[4] where it conducts no business operations, but conducts more than 50% of its business in New Mexico, and has lesser business activities in Connecticut, New York and Missouri.

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[4] The Court of Appeals characterized Maryland as the "hub." The stockholders, board of directors and executive committee meet in New York and New Mexico, but not in Maryland (R. 52). The chief bank is in New York, the Secretary (R. 34) and the General Counsel (R. 43) in Dallas. The contract for purchase of the Phillips properties was discussed, negotiated and executed in Oklahoma, New Mexico and Colorado (R. 45). The modification of the AEC contract for sales of uranium concentrate was negotiated by the New Mexico vice president in New Mexico and Colorado (R. 45). The chief executive officer spends more time out of Maryland than in Maryland (R. 31). The chairman is in New York (R. 34). The most that can be said of the "nerve center" or "hub" is that it is split among several states, including New Mexico.

This is a classic situation of the overall executive officers being in a state where the corporation conducts no business, and where the business of the corporation is conducted primarily in one state, but other states as well.

United Nuclear Corporation owns a 65% interest in the Homestake-Sapin Partnership, which owns uranium mines and mills in New Mexico, and is designated a limited partner, but in actual practice pursuant to supplemental and amended agreements (R. 65-86), as to creditors, petitioner is a general partner in that petitioner has operated almost 50% of the properties and otherwise assumes roles in the management of the partnership.[5] The partnership was organized under the laws of the State of New Mexico and operates solely in New Mexico (Par. 33, R. 21, 22; also Par. 14, R. 65, Partnership Agreement).

Petitioner was incorporated in 1954 as a Delaware corporation under the name of Sabre Uranium Corporation; it was the surviving corporation in a merger of May of 1956 and its name at that time was changed to Sabre-Pinon (Par. 4, R. 14). Upon its initial incorporation, it owned certain oil producing properties in the State of Texas and uranium claims in the states of New Mexico, Colorado and Utah. Petitioner's principal business at this initial time was the exploration, development and mining of uranium (Par. 5, R. 22).

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[5] Note 1 to financial statements, Plaintiff's Exhibits 3 and 4, the 1963 and 1964 Annual Reports of petitioner. The basic Homestake-Sapin Partnership agreement (Plaintiff's Exhibit 10, R. 57-65) is quite similar to and patterned after the prior Homestake-New Mexico Partnership agreement discussed by the Tenth Circuit in *Homestake Mining Company* v. *Mid-Continent Exploration Company*, (10th Cir. 1960) 282 F. 2d 787. The Court there stated: "While this agreement is denominated as 'Limited Partnership Agreement' its provisions are such that it may more accurately be described as a contract setting up several joint adventures. . . ." The basic Homestake-Sapin agreement was modified by Plaintiff's Exhibit 11, R. 65-86a. Material portions provide for an advisory committee of three persons, one designated by Homestake, another by United Nuclear, and a third jointly selected. Homestake's decision is final on partnership properties operated by it, and United Nuclear's decision final on properties operated by it. (R. 25) United Nuclear operates about 50% of the Partnership properties. (R. 22)

Substantially prior to August 2, 1963 (the date of the filing of the complaint), the oil properties as well as uranium properties in the states of Colorado and Utah had been disposed of, but other properties valuable for uranium had been acquired in New Mexico, whereby, as a result of its own exploration, some of the larger uranium ore reserves in the United States had been discovered on its properties in New Mexico (Pars. 5, 6, R. 22).

In December, 1956, petitioner entered into a limited partnership agreement, with Homestake Mining Company designated the general partner, for the purpose of placing certain of petitioner's uranium mining properties in New Mexico into production and constructing a mill and for the purpose of selling uranium concentrate to the Atomic Energy Commission. Petitioner owned 75% of all the assets, cash flow and profits of said partnership (Par. 7, R. 22, 23).

As of December 6, 1956, until a time in 1963, petitioner maintained its headquarters office in New Mexico (Par. 8, R. 23).[6]

Following the Sabre-Pinon merger in May, 1956 until September, 1961, the sole business of petitioner was the operation of and its ownership in the Homestake-Sapin Partnership and other exploration and acquisition of uranium mining properties and the mining of uranium ores from properties. All of said activities, business and properties were in the State of New Mexico (Par. 9, R. 23).

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[6] This statement of "headquarters office" as explained further by Par. 22, R. 28 is predicated upon and only denotes that the president and chief executive officer of petitioner maintained his principal office in Santa Fe, New Mexico during this time. The annual reports give addresses as follows: Plaintiff's Exhibit 1 (1961 Report), Santa Fe, New Mexico; Plaintiff's Exhibit 2 (1962 Report), 660 Madison Avenue, New York 21, N. Y.; Plaintiff's Exhibit 3 (1963 Report), same as Exhibit 2; Plaintiff's Exhibit 4 (1964 Report), Centreville, Maryland; Plaintiff's Exhibit 5 (Quarterly Report), same as Exhibit 4. "Principal executive offices" as of varying dates in 1963 and 1964 are stated as being in White Plains, New York or Centreville, Maryland as shown on reports to the S.E.C. (Plaintiff's Exhibits 6, 7, 8 and 9, R. 56-57).

As of September, 1961, petitioner, in addition to its ownership in the Sapin partnership, owned non-producing uranium leases in its sole capacity, and owned a 75% interest in and was the operator of two uranium mines in New Mexico, the ore from which was processed in the Homestake-Sapin mill near Grants, New Mexico. Petitioner also owned and operated trucks in which all ore shipped to the Homestake-Sapin mill was transported. Petitioner had entered into and completed transactions resulting in its purchase of the various limited partners in a limited partnership known as the Homestake-New Mexico Partnership. Petitioner thereafter consolidated these properties into the Homestake-Sapin Partnership as a result of an agreement with Homestake wherein petitioner received certain sums of money and became the 65% owner of all of the properties and income of this expanded partnership (Par. 10, R. 23, 24). All of the assets and interests were located in the State of New Mexico (Par. 10, R. 23; also see agreement of September, 1961, R. 65-86).

Petitioner became the operator of all properties acquired from the Homestake-New Mexico limited partnership that Homestake did not previously operate, and continued to be the operator of the trucking division (which was transferred to the Sapin partnership) and other producing mines. Homestake operated the partnership mills and certain other mines. This arrangement continues until the present time (Par. 11, R. 24; also, see Plaintiff's Exhibbit 11, R. 65-86, and Par. 12, R. 24, 25, 26).

Petitioner, still named Sabre-Pinon Corporation, continued to conduct substantially all of its business in New Mexico, and maintained its headquarters office in Santa Fe.

Petitioner, in April, 1962, merged with a corporation named "United Nuclear Corporation." Petitioner (Sabre-Pinon Corporation) was the surviving corporation and changed its name to United Nuclear Corporation (Pars. 14, 15, R. 27). All businesses that petitioner is presently engaged in, other than the uranium mining and milling business, were obtained by the merger with the "old" United Nuclear Corporation. The operations of the "old" United Nuclear Corporation were conducted solely in Connecticut, New York, Missouri, and Wash-

ington, D. C., and did not consist of any mining or milling activities whatever. For convenience, these various operations of the "old" United Nuclear Corporation will be referred to as the "Eastern Divisions". (Par. 15, R. 27 and Plaintiff's Exhibit 2). The present Fuels, Chemicals and Development divisions came from "old" United Nuclear.

As of the date of filing the complaint and at all material times, the only market for petitioner's mining and milling products was the AEC. The following statements are excerpted from the first annual report to stockholders following the acquisition of the Eastern Divisions (Plaintiff's Exhibit 2): "Helping to create sizeable markets for our own uranium reserves is a major objective of all of the manufacturing, research and development groups in the company." "Development of applications of nuclear power in the space programs could result in large and profitable markets in the late '60's and beyond." "All of United Nuclear's research, development and manufacturing efforts are directed to speeding achievement of competitive nuclear power and thus expanding the market for uranium." (Excerpted from pages 3 and 9). At the time of the 1962 merger all AEC contracts terminated December 31, 1966. The AEC had committed, as of the date the complaint was filed, to make purchases through 1970.

Immediately prior to the 1962 merger, petitioner had outstanding 2,605,532 shares of stock. An additional 1,499,113 shares were issued to the stockholders of "old" United Nuclear in connection with the merger. That is, 63.54% of all stock of petitioner following the merger was directly attributable and traceable to uranium mining and milling and other assets in New Mexico, and 36.46% of the stock was issued and traceable to the acquisition of the "Eastern Divisions." Following the merger, but prior to the filing of respondent's complaint, an additional 270,000 shares of petitioner's stock were issued in exchange for certain additional uranium and associated properties in New Mexico, thereby increasing by approximately 5% the percentage of outstanding stock attributable to properties in New Mexico as compared to all other properties of the cor-

poration (Par. 16, R. 27; Plaintiff's Exhibit 4, p. 3, 1st par.; Note 1, 2nd par., p. 20; and Note 6, p. 21, second item).[7]

Following the April, 1962 merger of Sabre-Pinon Corporation and "old" United Nuclear, but prior to August 2, 1963, petitioner purchased approximately 1,623 acres of farm land in the State of Maryland for a consideration approximating $1,250,000.00, which land is in part presently used as a headquarters office of the corporation (Par. 17, R. 27, as corrected by Par. 3, R. 47, 48).

Following the April, 1962 merger, but prior to the date the complaint was filed, there was approximately $1,000,000.00 in additional capital expenditures and improvements on properties acquired from the "old" United Nuclear Corporation in the states of Connecticut, New York and Missouri combined (Par. 18, R. 27).

Following the April, 1962 merger, the chief executive officer of Sabre-Pinon Corporation, the surviving corporation, continued as president and chief executive officer of petitioner. A majority of the directors of the merged corporation were named by the management of Sabre-Pinon (now named United Nuclear, Par. 20, R. 28).

On March 27, 1963, petitioner obtained the Phillips Petroleum Company uranium mining and milling properties and AEC contract, all in New Mexico, as of January 1, 1963, for the sum of $28,000,000.00 plus the assumption of certain obligations (Par. 19, R. 28).[8]

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[7] Cost records are generally recognized to have less value in determining values of mining properties than manufacturing properties. An ore body when developed goes on the books in relation to the cost of developing and blocking out the ore, but the *value* is based upon the size, grade and mineability of the ore. Often the best ore bodies cost the least to put in operation. This transaction is a classic example. It was placed on petitioner's books at its predecessor's cost of $343,834.00. Petitioner increased its stock over 6% for this acquisition.

[8] It is as a result of this transaction that the present controversy arose. Plaintiff's Exhibit 3 under Note 2, p. 18, filed with the Clerk herein as noted at R. 56, refers to a consideration of $23,000,000.00 for the mining and milling properties. The approximate additional $5,000,000.00 was working capital acquisitions of the Phillips Petroleum Com-

The "old" United Nuclear Corporation, prior to the merger and its dissolution in April, 1962, maintained its headquarters office in New York City (Par. 21, R. 28). Following the merger, the principal office of the chief executive was maintained in Santa Fe, New Mexico until February 28, 1963. The chief executive officer, having suffered a heart attack, was required to at least temporarily maintain a residence at a lower altitude and moved his principal office and the headquarters of petitioner to a farm it obtained in the State of Maryland (R. 87, 28). The president continues to be a registered voter and resident of New Mexico and considers New Mexico his legal residence (Par. 22, R. 28).[9] Paragraph 23 of said affidavit shows the place of meetings of the board, stockholders and various executive committee meetings of petitioner from August, 1960 until immediately prior to the bringing of this action (R. 23). This information is summarized and corrected in the amendment to the original affidavit in Items 18, 19 and 20 at R. 52 showing that 50% of the directors' meetings during said period were in New Mexico and 50% in New York;[10] that 14.3% of the executive committee meetings were in New Mexico, the remainder in New York; and that 83.4% of the stockholders' meetings were in New Mexico, and the remainder in New York.

Petitioner maintains offices in Delaware (no salaried personnel at said office); New Haven, Connecticut; Stamford, Connecticut (office of a wholly owned subsidiary); New York City; White Plains, New York; Washington, D. C.; Maryland

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pany including stockpiles of ore and uranium concentrate, inventories and miscellaneous matters, including certain receivables due from the AEC. The two figures are not inconsistent, but include different items.

[9] During this period (April, 1962 through February, 1963) when the president maintained his principal office in Santa Fe, the only stockholders' meeting was in Santa Fe. Directors and executive committee meetings were in New York and Santa Fe. (R. 29, 30, Items 13-23). In April and June 1963 petitioner filed reports with the Securities Exchange Commission listing the address of its "principal executive offices" as White Plains, New York. In August, 1963 and subsequent months this address was shown as Centreville, Maryland. (See Plaintiff's Exhibits 6-9, R. 56, 57).

[10] This percentage computation does not include one board meeting in California.

(since February, 1963, its headquarters office); Hematite, Missouri; Santa Fe and Grants, New Mexico (Par. 24, R. 30).

The president and chief executive officer of petitioner spends some time in each of the offices above referred to. In no single office does he spend more time than the remaining offices combined. In only two of said offices is an office set aside and designated for the use of the president. These are located in Maryland and Santa Fe, New Mexico. The chief executive officer usually spends several days of each month in the corporation's Santa Fe office and usually spends some time in most of the other corporate offices each month. He spends about as much time in the Washington, D. C. office as he does in Maryland and approximately as much time in the two offices combbined as in all other offices (R. 31). On the date petitioner's complaint was filed the president was physically performing his duties as chief executive officer of petitioner in the offices of petitioner in Santa Fe, New Mexico (Par. 24, R. 30, 31).

Paragraph 26, R. 33 shows that on August 2, 1963, four officers of petitioner were headquartered in Centreville; five office employees and eight to ten farm workers were also there. The president, although headquartered in Centreville, was physically residing in an apartment that petitioner has an ownership interest in on August 2, 1963 in Santa Fe, New Mexico performing his duties as president (last sentence, R. 31).

Sales and credit decisions of petitioner in all divisions are made by divisional vice presidents. Each vice president of a division, including Mr. Buchecker of the Mining and Milling Division, may enter into contracts up to $1,000,000.00 without consulting the president or obtaining board approval. This authority is actually exercised by the Mining and Milling vice president. Contracts involving a greater amount require additional approval. All sales of uranium concentrate derived from the Mining and Milling Divisions are made to the United States pursuant to contracts approved by the president while in New Mexico (Par. 27, R. 35).

For the fiscal year ending March 31, 1964, which included the date of the filing of the complaint, the total sales of the corporation were $49,826,000.00 of which $29,836,000.00 were attributable to mining and milling in New Mexico. Profits, after allocation of corporate expenses and interests on money, for said fiscal year were $5,295,681.00, of which $5,120,800.00 is attributable to New Mexico mining and milling.[11] The net cash flow of the corporation (excluding depletion, amortization and depreciation from net profit computations) was $10,239,303.00, of which $9,482,848.00 was attributable to New Mexico. (Par. 28, R. 35, 36, and amendments as to net cash flow figures appearing in Par. 5, R. 48). New Mexico accounted for 59.88% of sales, 96.7% of profits, 92.6% of cash flow. New York, which is one of the states respondent contends that petitioner's principal place of business is in, accounted for 9.25% of sales, minus 1.97% of profits (a loss) and 1.4% of cash flow. Maryland, the state the Court of Appeals found to be the principal place of business of said corporation, did not account for any of the sales, profits or cash flow, no properties relating to the nuclear business being located there.

All orders are shipped and billed from the division where the product or service is produced and sold. All records pertaining to the business of each division are kept at the division. The headquarters office reviews and consolidates such records (Par. 30, R. 36).

Personnel departments are located in each division with division officials doing the hiring and firing. There are three union contracts: two in the east, and one in New Mexico. Divisional vice presidents negotiate labor contracts (Par. 35, R. 40).

Warehouses are only located at divisions and no products are stored except in the area where produced (Par. 32, R. 37).

Petitioner's general counsel for overall corporate matters is located in Dallas, Texas. Special counsel is engaged as re-

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[11] The last partial year preceding the April, 1962 merger, Mining and Milling made $3,900,240.00; Eastern Divisions lost $8,002,711.00. Plaintiff's Exhibit 2, p. 1.

quired on advice of general counsel. Counsel on mining matters are resident New Mexico attorneys (Par. 37, R. 43).

Publicity and public relations activities are very limited and are planned from the Maryland and New York offices insofar as overall corporate matters are concerned. Local community and public relations are handled directly at the divisional level. Scholarships are only given by the Mining and Milling Division and are entirely administered and granted within the State of New Mexico to residents of New Mexico (Par. 38, R. 43). Customer relations with respect to service and credit are handled exclusively and directly by the various divisions (Par. 39, R. 44). New Mexico insurance for mining and milling is handled locally. Insurance for other divisions is negotiated by an officer in Centreville with advice of the respective divisional vice presidents (Par. 40, R. 44).

The Maryland office, while maintaining records of its own transactions, does not keep records for the divisions, but merely consolidates division reports (Par. 42, R. 44). Petitioner's independent auditors are headquartered in New York. The stock transfer agent and stock records are maintained in Santa Fe by the First National Bank of Santa Fe. The Phillips transaction, petitioner's largest transaction, was negotiated, drawn and discussed in Bartlesville, Oklahoma and Santa Fe, New Mexico, and executed by petitioner in an airplane between Santa Fe and Grand Junction, Colorado. The transaction was closed in Jersey City, New Jersey.[12] The Phillips-AEC contract transferred to petitioner was negotiated in Santa Fe, New Mexico and Grand Junction, Colorado. It was executed in Grand Junction, Colorado. Existing negotiations for Modification 4 and extension of the AEC contract were being negotiated almost entirely in Santa Fe and Grand Junction by the New Mexico division's vice president (Par. 46, R. 45).

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[12] This transaction occurred after the April, 1962 merger and involved $28,000,000.00, including inventories. It compares to the total original cost of all properties and inventories of all Eastern Divisions as of a date nearly identical with the filing of the complaint of $16,781,-639.00. The book depreciated value of all Eastern properties and inventories was as of said date $14,290,244.00 (computed from Par. 29, R. 32-33).

The amount the Atomic Energy Commission will pay for the additional concentrate to be purchased by it from petitioner in the 1969-1970 period is not yet fixed and therefore the dollar amount is not included in the contract backlog dollar figures. The price will be determined as a result of costs during the period prior to 1969. The AEC, to determine the proportion of general corporate expenses attributable to the mining and milling divisions separate from the Eastern Divisions, requires allocation of general corporate expenses, subject to audit by the AEC, upon a standard accounting method known as the Massachusetts Formula.[13] This formula is arrived at by considering equally sales, property and salaries of each division for the fiscal year ending March 31, 1964, which includes the date of the filing of the complaint. Petitioner's computation of said formula in the regular course of business for the AEC is as follows (Par. 49, R. 46 as amended Par. 8, R. 50):

State	Allocation of General Corporate Expenses
New Mexico	58.754%
Connecticut	26.765%
Rhode Island[14]	0.097%
New York	10.532%
Missouri	3.852%

The litigation in which United Nuclear has been involved has historically been in New Mexico. Plaintiff's Exhibit 2 (1962 Annual Report) p. 17, Note 11, refers to a case wherein petitioner was defendant and $4,000,000.00 was claimed as damages, which was pending in McKinley County, New Mexico. The note further states:

> "Other claims and suits are pending in connection with the acquisition of properties of United Western Minerals Company. . . "

[13] This formula was approved by this Court in General Motors Corp. v. District of Columbia, 380 U.S. 553, 85 S. Ct. 1156, 14 L. Ed. 2d 68 (1965).

[14] Rhode Island was activated in the fiscal year, but after the filing of the complaint.

(The United Western acquisition principally consisted of United Western's interest in the Homestake-New Mexico Partnership referred to above operated exclusively in New Mexico.)

Exhibit 3 (1963 Annual Report) p. 20, Note 10, in part states:

> "Several claims are pending against the company, largely in connection with its mining activities."

The present cause, seeking several millions of dollars damages and other relief, relates entirely to New Mexico mining and milling, and purchase of mining and milling properties in New Mexico. The purchase agreement was negotiated in Bartlesville, Oklahoma, and Santa Fe, New Mexico, and was executed in an airplane between Santa Fe and Grand Junction, Colorado.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR THE ALLOWANCE OF THE WRIT

1. The issue is an important question of federal law which has not been, but should be, settled by this Court, and the opinion and judgment in this case conflicts with the opinions and judgments of other Courts of Appeal.

28 U.S.C. Section 1332, providing original jurisdiction of the federal district courts of civil actions between citizens of different states, was amended by Congress in 1958 to provide that for the purposes of 28 U.S.C., Section 1332, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. The dual citizenship of corporations was also provided as to the removal provisions of 28 U.S.C. Section 1441. Prior thereto a corporation had been considered only a citizen of the state in which it was incorporated. The purpose of the act was to reduce the number of diversity cases filed in or removed to the federal district courts. *Canton v. Angelina Casualty Co.*, (5th Cir. 1960) 279 F. 2d 553.

Since the 1958 amendment, the Courts of Appeals have considered the principal place of business of corporations under 28 U.S.C. § 1332 on several occasions. *Anniston Soil Pipe Co. v. Central Foundry Co.* (N.D. Ala. 1963) 216 F. Supp. 473, aff'd (5th Cir. 1964) 329 F. 2d 313; *Barkhorn v. Adlib Associates, Inc.* (9th Cir. 1965) 345 F. 2d 173; *Canton v. Angelina Casualty Co.* (5th Cir. 1960) 279 F. 2d 553; *Danos v. Waterford Oil Co.* (5th Cir. 1965) 351 F. 2d 940; *Egan v. American Airlines, Inc.* (2nd Cir. 1963) 324 F. 2d 565; *Kelly v. United States Steel Corp.* (3rd Cir. 1960) 284 F. 2d 850; *Sabo v. Standard Oil Co. of Indiana* (7th Cir. 1961) 295 F. 2d 893; *Shahmoon Industries, Inc. v. Imperato* (3rd Cir. 1964) 338 F. 2d 449.

Certiorari was not sought in any of the cases decided by the Courts of Appeal dealing with the principal place of business of a corporation under the 1958 amendment to 28 U.S.C. Section 1332, and this Court has not previously had an opportunity to consider the rules governing the determination of

the principal place of business of a corporation under the diversity provisions. At its last term, this Court did consider whether an unincorporated association should be treated as a corporation for diversity purposes under the provisions of 28 U.S.C. Section 1441 in *United Steel Workers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (1965). In that case, certiorari was granted to review the opinion and judgment of the Fourth Circuit on an interlocutory appeal.

Since 28 U.S.C., Section 1332 and 28 U.S.C., Section 1441 govern the original and removal jurisdiction of the federal district courts in diversity cases, the rules for determining the principal place of business of a corporation thereunder are of great and immediate importance to the administration of justice in the federal courts.

The issue presented by the facts in this case is that most frequently requiring consideration by the Courts of Appeal and district courts. Where a corporation has over-all corporate control in one state, but its income producing facilities are in another or several others, the courts have frequently been required to determine the principal place of business of the corporation. In *Kelly v. United States Steel Corporation,* supra, over-all corporate control was in New York, productive facilities concentrated in Pennsylvania (less than 50%) and economic activities spread over all other states. *Anniston Soil Pipe Co. v. Central Foundry Co.,* supra, involved a company with executive offices in New York and productive facilities located in Alabama. *Danos v. Waterford Oil Co.,* supra, dealt with a corporation whose officers were located in several states, the president in New York, and production concentrated in Louisiana. *Sabo v. Standard Oil Co. of Indiana,* supra, required the determination of the principal place of business of Standard Oil of Indiana, which had executive offices in Illinois and significant economic activities in the mid-western states, including Illinois.[15]

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[15] The district courts have also frequently considered the problems presented by the type of corporation here involved. See *Leve v. General Motors Corp.* (S.D.N.Y. 1965) 246 F. Supp. 761; *Inland Rubber Corp. v.*

It would appear the concentration of finance, communications, and federal regulatory power on the eastern seaboard or other population centers will tend to cause corporations to locate their chief executives and their staffs in these centers and away from the locale of the physical plant and productive properties of the company, which may be reached conveniently by rapid air transportation. Thus, the type of corporate organization here involved would seem to become increasingly more common.

This case presents a well-developed record as to all the activities, operations, organization and history of the corporation involved, United Nuclear Corporation. There is no dispute as to the facts involved, and there was no testimony heard by the trial court, and thus no question of credibility is involved.

In determining the principal place of business of the type of corporation here involved, the courts and commentators have suggested two differing tests: the "nerve center" (called "hub" by the Court of Appeals in this cause) and the "activity" tests.

Moore's Federal Practice Judicial Code Pamphlet (1966), Section 1332 states the approaches taken by the courts as follows:

> "Courts have held that the principal place of business under Section 1332(c) is a factual question to be determined on a case by case basis through a review of the total activities of the corporation (citations omitted) . . . But a survey of the activity of the corporation, without guiding criteria is unsatisfactory. Is the principal place of business the place where the directors meet and financial decisions are made; where most raw materials are purchased; or where the principal offices of the corporation are located? . . . Perhaps no definition of prin-

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Triple A Tire Service, Inc. (S.D.N.Y. 1963) 220 F. Supp. 490; *Scot Typewriter Co. v. Underwood Corp.* (S.D.N.Y. 1959) 170 F. Supp. 862; *Textron Electronics, Inc. v. Unholtz-Dickie Corp.* (D. Conn. 1961) 193 F. Supp. 456; *Foster v. Midland Valley Railroad Co.*, (N.D. Okla. 1965) 245 F. Supp. 60.

cipal place of business can be given which will adequately cover every type of corporate enterprise. Nevertheless certain lines of reasoning have emerged in the cases since 1958.

NERVE CENTER TEST

Many decisions have followed the analysis set forth in Scot Typewriter Co. v. Underwood Corp. (SDNY) 1959 170 F. Supp. 862, 865 (Court held that while corporation carried on manufacturing and sales in several states, with the largest manufacturing operations in Connecticut, New York was its principal place of business, for this was the place where policy determinations, direction and control of corporate affairs, was located; the 'center of gravity' of corporate activity. 'Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective.')

PLACE OF OPERATIONS TEST

Other courts have laid stress on the place where the corporation's actual business activities and operations are carried on. (citations omitted). . . . The Court of Appeals for the Third Circuit denied the applicability of the 'nerve center' test in determining the principal place of business of one of the largest American corporations. (Kelly v. U. S. Steel Corp. CA 3rd 1962, 284 F. 2d 850)."

In its judgment and opinion in this cause, the Court of Appeals stated the rule as follows:

"Where a corporation carries on its business in a number of states, no one of which is clearly the state in which its business is principally conducted, the state where a substantial part of its business is transacted and from which centralized general supervision of all of its

business is exercised, is the state in which it has its principal place of business." (Appendix A hereto, p. 39-40)

The Court below then stated:

" . . . We think the evidence established that the principal place of business of Nuclear was located in Maryland." (Appendix A hereto, p. 43, footnote 11.)

The test stated by the Court of Appeals below does not seem on its face incorrect, but in its application to the undisputed facts in this cause, the opinion and judgment is in conflict with the opinions and judgments of other Courts of Appeal.

The Court of Appeals below noted there were several divisions of United Nuclear for the most part geographically separated, and thus chose Maryland as the executive "hub." The Court did not consider whether the fact that over 96% of the profits, 92% of cash flow, 77% of gross book, 59% of sales and 87% of contract backlog was located in New Mexico established the fact that New Mexico was the state where the corporation's business was principally conducted.

Likewise, the Court did not consider whether the lack of any business activities relating to the corporation's business in Maryland precluded Maryland being the location of petitioner's principal place of business. The president, senior vice president, financial vice president and administrative vice president and their immediate staff and secretaries have their offices on the farm in Maryland and eight to ten farm workers are located there, but there are no business activities relating to petitioner's business located in Maryland.

The present case presents a sharp conflict between the approach taken by the Tenth Circuit and the approach taken by the Third Circuit and other Courts of Appeal. The Tenth Circuit accepted the very test that was rejected in *Kelly v. United* States Steel Corp., supra.[16] It also rejects the test proposed by

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[16] In *Kelly v. United States Steel Corp.*, supra, the Court stated: "If the test of 'principal place of business' is where such final decisions are made on corporate policy, including its financing, then the appellants are right in pointing to New York as the principal place of business."

the leading commentator on the subject. In Moore's Federal Practice Judicial Code Pamphlet (1966), Section 1332 the question is resolved as follows:

> "The stated objective of the new statute is to deal with the situation of a corporation doing its major business in one state, yet chartered in a second, and the advantage the corporation had of being able to sue, in federal court, citizens of the state in which it does its chief business; and the advantage of removing to federal court suits brought against it in state court by citizens of such state; advantages not had by locally chartered corporations. 2 U.S. Code Cong. & Adm. News (1958) 3102. It would, therefore, seem that in determining a corporation's principal place of business a court should be primarily concerned in *ascertaining the state on which the corporation most impinges;* the state in which the activities of the company would be most likely to bring it into court. And this state is more likely to be where the actual physical operations are carried on and directed than the place where occasional high level policy decisions are made." (Emphasis added).

The corporation here involved clearly impinges on New Mexico more than any other state and more than all other states combined, and if the test stated by Moore is correct, the Court of Appeals below is incorrect.

A review of the legislative history of the 1958 amendment to 28 U.S.C., Section 1332 shows the intent of Congress was not followed in the opinion and judgment of the Court of Appeals in this cause.

The legislation which became Section 1332(c) was originally drawn by the Committee on Jurisdiction and Venue of

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The Court then rejected this test, and selected Pennsylvania as the principal place of business. The Court of Appeals in the present cause selected Maryland because it was the "hub" without considering that the business of the corporation was principally conducted in New Mexico, and without requiring any of the business of the corporation to be conducted in the "hub" state.

the Judicial Conference of the United States, 2 U. S. Code Cong. & Admin. News (1958) 3114. The language originally proposed was (amending 28 U.S.C., Section 1332):

> "(c) For the purposes of this section and of section 1441 of this title a corporation shall be deemed a citizen of any State by which it has been incorporated. For these purposes it shall also be deemed a citizen of a State *from business transacted within which it derived more than half its gross income* during the fiscal year last preceding the commencement of the action, if it is brought under this section, or preceding the filing of the petition for removal under section 1446." (2 U. S. Code Cong. & Admin. News (1958) 3126; (Emphasis added).

After some or all of the judicial conferences of the Circuits had the opportunity to review the proposed legislation, the Committee reported to the Judicial Conference that the present "principal place of business" language should be used. 2 U. S. Code Cong. & Admin. News (1958) 3126.

It would seem then in recommending that "principal place of business" be used instead of the state accounting for more than half a corporation's gross income, the Committee had in mind those corporations which have operations in a number of states, no one of which accounts for half of the gross income. Under the original language proposed, such a corporation would be a citizen only of the state of incorporation. The language adopted provides duel citizenship even for a corporation not deriving half its gross income from any one state, and furthers the underlying purpose of the amendment to reduce the number of causes over which the federal district courts have original or removal jurisdiction based upon diversity of citizenship. It is not believed that, by substituting "principal place of business" for the gross income test, the Committee intended that a corporation would not be considered a citizen of a state which produces more than half its gross income. A statement of the Committee in connection with its original proposal is illuminating in this regard:

> "A corporation which receives more than half of its gross income from business within a single state is so closely tied to the local commercial fabric of that State as to be properly considered a citizen thereof. . . ."
> (2 U. S. Code Cong. & Admin. News (1958) 3120.)

The Tenth Circuit's opinion holding United Nuclear's principal place of business is not in New Mexico where it derives over 92% of gross income (cash flow) and 96% of net income is in direct conflict with the conclusion of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States.

A review of the reported cases applying principal place of business shows that in every instance where a corporation has derived half of its gross income from a single state, it has been considered a citizen of that state.[17]

Petitioner derives 92.6% of its gross income (called cash flow in the affidavits) in New Mexico and none at all from Maryland.

The purpose of diversity jurisdiction has traditionally been based upon the fear that a person or corporation foreign to a state may be prejudiced in a proceeding in a state court against a local citizen. *Canton v. Angelina Casualty Co.*, supra. Petitioner's substantial business developed in New Mexico as the result of its discovery of some of the largest uranium ore reserves in the United States. It developed the properties, in

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[17] See, for example, *Anniston Soil Pipe Co. v. Central Foundry Co.*, supra; *Barkhorn v. Adlib Associates, Inc.*, supra; *Danos v. Waterford Oil Co.*, supra; *Epstein v. Guilford Industries, Inc.*, (S.D.N.Y. 1963) 218 F. Supp. 286; *Foster v. Midland Valley Railroad Co.*, (N.D. Okla. 1965) 245 F. Supp. 490. In *Textron Electronics, Inc. v. Unholtz-Dickie Corp.*, (D. Conn. 1961) 193 F. Supp. 456, where Connecticut, with 57% of sales was rejected in favor of Rhode Island, the corporate "nerve center," the "nerve center" exercising unusual control, requiring approval in the central office for all capital expenditures in excess of $2,500, compared to the authorization of United Nuclear's vice presidents to execute contracts up to $1,000,000 without approval. No showing was made that more than 50% of gross *income* (cash flow) or net income was received in Connecticut as distinguished from sales (gross *receipts*).

part by the formation of the Homestake-Sapin Partnership, in which it owns a 65% interest and operates approximately 50% of the properties. It was the surviving corporation in the 1962 merger with "old" United Nuclear, and the New Mexico properties accounted for about two-thirds of the stock. The merger with "old" United Nuclear was to develop markets for its New Mexico uranium ores.

Since the merger with "old" United Nuclear, a substantial amount of stock was issued for additional uranium properties in New Mexico. A farm was purchased in Maryland for the corporate headquarters and approximately $1,000,000 in additional capital investment has been made in the eastern divisions combined. The purchase of the uranium mining and milling properties of Phillips Petroleum Company in New Mexico in 1963 for $28,000,000, plus the assumption of certain liabilities, constitutes an investment more than double the book value of all the eastern divisions combined. The present cause is a further illustrates that petitioner's significant litigation has always been in New Mexico.

The determination of the Court of Appeals that New Mexico is not the state of petitioner's principal place of business does not further the basic purpose of diversity jurisdiction to lessen the possibility of local prejudice and, in fact, is violative of this purpose.

The Court of Appeals below determined that since petitioner had several divisions in different states the "hub" or central corporate headquarters was to be selected. The Court did not consider the extreme inequality in the magnitude of sales, property, profits and contract backlog of the divisions, and did not consider that Maryland had no business activities relating to the corporation's business other than the headquarter office.

The Tenth Circuit did not in its opinion consider any economic and physical facts of the petitioner other than employees.[18]

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[18] Footnote 10 of the opinion states

"Counsel for Nuclear contends that a majority of its employees live in New Mexico. Their contention would be correct if the

The test employed by the Tenth Circuit is an extreme "nerve center" or "hub" test. The commentators and cases have frequently noted the differing approaches of the "nerve center" test and the "activities" test. In *Kelly v. United States Steel Corporation*, supra, Judge Goodrich, writing for the Court, referred to the "nerve center" test as follows:

> "The appellants urge upon us that the test should be where the 'nerve center' of the corporation's business is and they urge that the nerve center is New York. We do not find the figure of speech helpful. Dorland's Medical Dictionary tells us that a nerve center is 'any group of cells of gray nerve substance having a common function.' We think there will be, in the case of United States Steel Corporation, a good many collections of nerve cells serving the common function of making the corporate enterprise go.

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employees of the Homestake-Sapin Partnership are employees of Nuclear. In that partnership, Nuclear is a limited partner. Homestake-Sapin is a separate entity from Nuclear. Nuclear does not control the employees of the partnership. They should not be regarded as employees of Nuclear. Moreover, the location of a majority of the employees would be only one element to be considered in determining the principal place of business of Nuclear."

The undisputed facts show that United Nuclear entirely and directly controls 173 employees of the Homestake-Sapin Partners. Although United Nuclear is designated as the limited partner, it in fact controls and supervises partnership employees, operates partnership mines and operates the partnership trucking division. (R. 25, 26). The agreement governing the operations of the Sapin partnership was last amended in 1961. (R. 65) Paragraph 11a (R. 80) provides: "Effective as of the Closing Date, subject to the provisions of Paragraph 11(c) hereof, Sabre shall operate, according to sound business practice, the Trucking Operations, the present Lance Joint Venture properties and mines, and any future mines placed on Lance properties, the Section 11 mines, and any mines that in the future may be placed on any of the mining properties and the properties themselves acquired pursuant to the Agreements listed in Paragraph E hereof, other than Sections 32 (T. 14 N., R. 9 W.), 14 and 29, subject to the terms and conditions of this paragraph." Clearly the opinion of the Circuit Court that "Nuclear does not control the employees of the partnership" as applied to all employees of the partnership is erroneous.

> "We turn, therefore, from a pleasant and alluring figure of speech to a consideration of the facts of the Steel Corporation's life."

The Third Circuit, in *Kelly*, then examined the life of a great corporation. It rejected the contention that the place where income tax returns were filed was significant.[19] In *Kelly*, the Court rejected that the place of meeting of the board of directors was a criterion noting that:

> ". . . Boards of directors may choose their own place to meet at will. One can easily picture a peripatetic board which holds its meetings in some spot where the climate is favorable and recreational opportunities abound. That spot, of course, may change from time to time as the seasons and the board personnel changes."[20]

In *Kelly*, the Third Circuit noted that the chairman of the board's offices were in New York and he spent one day a week in Pittsburgh. The president divided his time evenly between New York and Pittsburgh.[21] The executive committee and the

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[19] In *Kelly* the Court said "We make little out of the fact that the federal income tax return is filed in New York. As will be seen from enumeration of other things which take place in that state, New York would be the natural filing place for its tax return." In this case the Tenth Circuit relied upon the filing of tax returns in Maryland as one of the facts establishing Maryland as the principal place of business. (Appendix A hereto, p. 42).

[20] The Tenth Circuit in this case noted that of the six directors meetings of United Nuclear held from April 1, 1962 until August 2, 1963, one meeeting was held in New Mexico and the remaining five in New York City. Six executive committee meetings were held—one in New Mexico, five in New York City. This corporation presents a perfect example of where the meeting place of the board of directors and executive committee is controlled more by the convenience of reaching a meeting place rather than where any substantial activities are conducted. As a matter of fact, there are no substantial business activities in New York City, and the only division in New York is located in White Plains and Pawling.

[21] The president and chief executive officer of United Nuclear Corporation spends several days out of each month in the Santa Fe office. He also spends some time in other division headquarters during the course of a month, and spends as much time in Washington, D. C. as in Maryland.

board met regularly in New York as did the finance committee. The secretary of the corporation had his office in New York and the treasurer, comptroller and general counsel had their offices there, where the company owned a building at 71 Broadway.[22] The public relations department of United States Steel was in New York City as were its major banking activities and management of its corporate pension funds.[23]

After considering these "nerve center" activities in the City of New York, the Third Circuit said

> "If the test of 'principal place of business' is where such final decisions are made on corporate policy, including its financing, then the appellants are right in pointing to New York as the principal place of business."[24]

However, the Third Circuit rejected New York as the principal place of business of United States Steel Corporation. They concluded that Pennsylvania and not New York was the principal place of business. In Pennsylvania the operating policy committee conducted its affairs. Many major decisions were made in Pennsylvania. 32.13% of its employees were in Penn-

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[22] In this case, the secretary of the corporation is in Dallas, the treasurer, who is also a vice president, is in Maryland, and the general counsel is in Dallas. Other than the seceretary and general counsel being in Dallas, no other activities are conducted in the State of Texas.

[23] Over-all public relations of United Nuclear Corporation, which are not a significant activity, are conducted in New York City, although each division including the mining and milling division handles public relations locally. United Nuclear's major bank is the Chase Manhattan in New York City, although United Nuclear and the Homestake-Sapin Partners are among the larger depositors of the First National Bank in Albuquerque, New Mexico, and the First National Bank of Santa Fe was the stock transfer agent.

[24] In this connection, the Tenth Circuit's opinion in this case accepted the test referred to above which was rejected by the Third Circuit. It said

> "The executive headquarters at Centreville is the hub where the corporate policies are formulated and important corporate contracts are finalized, and from which supervision and direction emanate, to be conformed to and carried out by the local managers of the several divisions."

sylvania, 25 times as many as in New York and more than twice as many as any other state.[25]

More than one-third of the tangible property was in Pennsylvania.[26] In the United States Steel case, Pennsylvania did not have a majority of the productive capacity of the corporation nor a majority of the employees. It did, however, have more than any other state.[27] The court in *Kelly* found that the economic facts when added to the day-to-day corporate activity and management in Pennsylvania resulted in the irresistible conclusion that the principal place of business of United States Steel was in Pennsylvania.

The decision of the Tenth Circuit in the present cause is directly in conflict with the opinion of the Third Circuit in *Kelly*. Maryland, in this case, does not present the concentration of executive control over the corporation as was located in New York in the United States Steel case.[28] As in the *Kelly*

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[25] There is precisely the same employee ratio between Maryland and New Mexico, considering Homestake-Sapin employees directly controlled and supervised by United Nuclear, as in the United States Steel case. In other words there are 25 times as many employees in New Mexico as in Maryland and this includes 8 to 10 of the Maryland employees who are farm hands.

[26] More than two-thirds of the value of United Nuclear's properties stated at original cost (gross book) or net book (original cost less depreciation and depletion) is in New Mexico. 2.46% of gross book was in Maryland, consisting of the farm, which is used as executive headquarters. Less than 1% of United States Steel's tangible property was in New York.

[27] In this case, New Mexico has the majority of the productive capacity of the corporation and produces over 90% of the profits and cash flow. Maryland produces no profits or cash flow and has no productive capacity.

[28] The Tenth Circuit in its opinion in this cause stated that important corporate contracts are finalized in Centreville. The record shows that the largest transaction, the purchase of the uranium mining and milling properties of Phillips Petroleum Company, involved negotiations in Bartlesville, Oklahoma and Santa Fe and Grand Junction, Colorado. Furthermore, the mining and milling vice president negotiated the extension and modification of the Atomic Energy Commission contract for the sale of uranium concentrate entirely in New Mexico and Grand Junction, Colorado. The Mining and Milling Vice President is

case, the "nerve center" of United Nuclear is not located in any one state, and, at most, United Nuclear has a split "nerve center" or "hub." Although the president and chief executive officer, administrative vice president, senior vice president and financial vice president are located in Maryland, the stockholders and executive committee have never met there, nor has the Board of Directors. The chief executive officer is out of Maryland more than he is in Maryland and the largest contract which the corporation has entered was discussed, negotiated and executed in Oklahoma, New Mexico and Colorado.

It is clear that the day-to-day operations of most of the company's assets and properties occur in the State of New Mexico. The New Mexico vice president has the authority to enter into contracts up to $1,000,000.00 without Board approval, with no limit of such contracts he may so enter. This is an authority which he actually exercises.

Most of the company's sales are to the Atomic Energy Commission from the New Mexico properties. The major modification of the contract with the AEC was negotiated by the Mining and Milling Vice President in New Mexico and Colorado.

Maryland produces none of the income, profits, or sale revenue of the corporation.

The commentators and the cases have from time to time suggested that the "nerve center" test and the "activities" test could be reconciled. Thus, in *Eagan v. American Airlines, Inc.*, (2nd Cir. 1963) 324 F. 2d 565, the Court stated:

> "There is no conflict between Judge Rayfiel's decision and Judge Weinfeld's in Scot Typewriter Co. v. Underwood Corp. D.C.S.D.N.Y., 1959, 170 F. 2d 862, on the one hand, and the Third Circuit case of Kelly v. U. S. Steel Corp., 3d Cir., 1960, 284 F. 2d 850, on the other; in that case, overall management control was split between

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authorized without board approval to enter into contracts up to $1,000,000.00 without limit on the number of such contracts he may enter. He, in fact, exercises this aucthority.

New York and Pennsylvania and the Court found a predominance of activity in the latter state."

38 N.Y.U. Law Review 148 (1963) at 156 theorizes:

> "It has been thought, and not without good reason, that *Scot* and *Kelly* have carried forward into the area of corporate diversity the home office versus actual place of operations controversy which exists in the cases under the Bankruptcy Act. However, as can be seen, the two leading cases since the enactment of the 1958 Amendment, *Scot* and *Kelly*, may in fact be reconciled. In both, the courts looked to the overall activities of the respective corporation."

Regardless of whether *Scot* and *Kelly*, that is, the classical "nerve center" vs. classical "activities" cases, were in conflict, it is clear that the decision of the Tenth Circuit in this case is in conflict with the "activities" approach set forth by the Third Circuit, and not consistent with the "nerve center" test proposed by the District Court in the Second Circuit.

Even in the *Scot* case, which is said to be the leading "nerve center" case, the Court looked only to the "nerve center" where no other state had a predominance of the activities of the corporation, and where there were substantial activities in the state where the executive decisions were made.

The Tenth Circuit in this case proposed a rule that looks only at the "home office," "nerve center" or "hub" of the corporation and does not consider whether or not there are any substantial activities in the state where the executive offices are located and, further does not determine whether another state predominates the corporation's activities, as New Mexico clearly does.

The extreme "nerve center" approach adopted by the Tenth Circuit in this case is in conflict with *Anniston Soil Pipe Co. v. Central Foundry Co.*, supra, from the Fifth Circuit, where the activities of the corporation were conducted primarily in Alabama and the executive offices were located in New York. The Fifth Circuit in that case followed the "activities"

approach where one state predominates the activities, and is consistent with Moore's view that the principal place of business of the corporation should be selected on the basis of the state upon which the corporation most impinges and the state in which most of its litigation is likely to occur.

In *Sabo v. Standard Oil Co. of Indiana*, supra, the Seventh Circuit, considering the principal place of business of Standard Oil of Indiana, which had its executive offices in Chicago, and considerable activities spread over the several midwestern states, selected Illinois as its principal place of business. In that case there were extensive and substantial operations in the state of Illinois where the "nerve center" of the corporation was also located. No other state appeared to predominate the economic activities of the corporation and thus Illinois was selected as the principal place of business.

The above analysis shows that the Tenth Circuit opinion and judgment in this case conflict seriously with the opinions of other circuits on an important question of federal law, and this Court should take certiorari to resolve the conflict, and to set forth the considerations and rules governing the basic diversity jurisdiction provisions relating to corporations.

The opinion and judgment of the Court of Appeals in this cause is in conflict with the decisions of other circuits, and cannot be reconciled with Moore's view that the principal place of business should be determined by looking at the state upon which the corporation most impinges. The judgment cannot be reconciled with the legislative history indicating a corporation deriving more than half its gross income from a state is so closely tied to the local commercial fabric as to be properly considered a citizen of that state.

The undisputed facts established petitioner's principal business as the mining and milling of uranium in New Mexico, and that very substantially more than half of the corporation's business was conducted in New Mexico. The Court of Appeals concluded, notwithstanding and without even discussing these undisputed facts, that:

> "In the light of the foregoing facts and the deductions which may reasonably be drawn therefrom, we do not think it can be said that the trial court erred in finding that the principal place of business of Nuclear was not located in New Mexico. . . ."
> (Appendix A hereto, p. 43)

When the undisputed facts not discussed by the Court of Appeals are considered, a conflict with other circuits and commentators is apparent, real and substantial. The Court of Appeals made "deductions which may reasonably be drawn," without discussion of the overwhelming predominance of the corporation's business, investment and profits being solely in New Mexico, in order to establish jurisdiction in the District Court. Basing diversity jurisdiction on deductions in favor of jurisdiction would seem contrary to the well established rule of this Court that it is the burden of the party contending for jurisdiction to establish diversity. *McNutt v. General Motors Acceptance Corporation* (1936) 298 U.S. 178, 56 S. Ct. 780, 80, L. Ed. 1135.

CONCLUSION

It is submitted an important question of federal law which should be, but has not been, determined by the Court is involved, and that it is a question upon which the opinion and judgment of the Court of Appeals in this cause conflicts with other circuits, and this Court should grant its Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

OPINION OF TENTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1966

UNITED NUCLEAR CORPORATION
a Delaware corporation,
Appellant,
v.
MOKI OIL AND RARE METALS CO.,
a New Mexico corporation,
Appellee.

No. 8307

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Harry L. Bigbee (Harl D. Byrd, G. Stanley Crout, Richard N. Carpenter, Arthur H. Coleman and Bigbee & Byrd on the brief) for appellant.

Robert L. Blumenthal (Lewis R. Sutin, Robert W. Botts, Sutin & Jones, Botts, Botts & Mauney and Carrington, Johnson & Stephens on the brief) for appellee.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

PHILLIPS, Circuit Judge.

This is a diversity action brought by Moki Oil & Rare Metals Company,[1] a New Mexico corporation, against Phillips Petroleum Company[2] and United Nuclear Corporation,[3] both Delaware corporations.

28 USCA § 1332 in part here material reads:

> "§ 1332. *Diversity of citizenship; amount in controversy; costs*
>
> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> "(1) citizens of different States;
>
> * * * * * *
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business:
> * * *."

The complaint alleged that Nuclear had its principal place of business at New York City, New York. Nuclear filed a motion to dismiss the action on the ground that it had its principal place of business in New Mexico. In order to give district courts original jurisdiction under § 1332, supra, the citizenship of all parties on one side of the case or controversy must be diverse to those on the other side.[4]

After the motion challenging the jurisdiction was filed by Nuclear, Moki filed an amended complaint in which it set up that Nuclear had its principal place of business in the State of Maryland or in the State of New York.[5] Thereupon, Nuclear

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[1] Hereinafter called Moki.

[2] Hereinafter called Phillips.

[3] Hereinafter called Nuclear.

[4] Indianapolis v. Chase National Bank, 314 U.S. 63, 69; Mathers & Mathers v. Urschel, 10 Cir., 74 F. 2d 591, 592.

[5] The complaint and amended complaint alleged that Phillips had its principal place of business in Bartlesville, Oklahoma, and that allegation is not challenged.

filed an amended motion to dismiss on the ground that it has its principal place of business in New Mexico.

The amended motion came on for hearing before the court upon affidavits filed by Nuclear and Moki, exhibits introduced in evidence, and portions of certain depositions taken in the cause. The court found that Nuclear had its principal place of business in a state other than the State of New Mexico, and therefore complete diversity of jurisdiction existed between Moki and Phillips and Nuclear.

Subsection (c) of § 1332, supra, was embraced in a proposed bill drafted by a committee of the Judicial Conference of the United States. The Judicial Conference approved the draft bill and forwarded copies thereof to appropriate officers of the House and Senate, with the recommendation that it be enacted by the Congress.[6]

The phrase "principal place of business" was taken from the jurisdictional section of the Bankruptcy Act (July 1, 1898, 30 Stat. 545, 11 USCA §11(a)(1)), because there existed a large body of bankruptcy decisions interpreting its meaning.[7]

The phrase also appears in the venue section of the Natural Gas Act (June 21, 1938, § 19(b), 52 Stat. 831, 15 USCA § 717r(b)), providing for court review of orders of the Federal Power Commission.

Where the corporation has its principal place of business is a question of fact to be determined by "the character of the corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations."[8]

Where a corporation carries on its business in a number of states, no one of which is clearly the state in which its business is principally conducted, the state where a substantial

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[6] U. S. Code Congressional and Administrative News, Vol. 2, 85th Cong., 2d Session, 1958, pp. 3102, 3133-3136.

[7] U. S. Code Congressional and Administrative News, supra, p. 3102.

[8] Colorado Interstate Gas Co. v. Federal Power Commission, 10 Cir., 142 F. 2d 943, 951;

Scot Typewriter Co. v. Underwood Corp., D.C.S.D.N.Y., 170 F. Supp. 862, 864;

Chicago Bank of Commerce v. Carter, 8 Cir., 61 F. 2d 986, 988.

part of its business is transacted and from which centralized general supervision of all of its business is exercised, is the state in which it has its principal place of business.[9]

There is no substantial dispute in the facts. Nuclear is a vertically integrated nuclear company, the activities and interests of which cover the full spectrum of the nuclear industry, from mining, milling and fuel processing to reactor utilization and waste management.

It has five divisions, for the most part geographically separated and all reporting to the executive office of the corporation independently of each other, except the Chemicals Division, which reports to the Vice President of the Fuels Division.

The Mining and Milling Division operates the uranium mines owned by Nuclear, located in New Mexico, and manages the mineral properties of Nuclear in other states. It also handles dealings between Nuclear and a limited partnership, Homestake-Sapin Partners, in which Homestake Mining Company is the general and managing partner and Nuclear is the limited partner. The Vice President of the Mining and Milling Division has offices in Santa Fe, New Mexico. The operation of such division is under the direction of its Vice President and his staff at Santa Fe, New Mexico, but such operation is subject to the general direction and supervision of the superior executive officers of Nuclear, as is the operation of all the other divisions hereinafter mentioned.

The Fuels Division maintains a manufacturing facility in New Haven, Connecticut, an assembly plant in Montville, Connecticut, and supervises a cold scrap reprocessing plant in Rhode Island. It also supervises a Chemical Division, located in Missouri. The Fuels Division is active in every area of nuclear fuel preparation, fabricating and recovery. It is operated

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[9] Chicago Bank of Commerce, supra, at 988, 989;
Dryden v. Ranger Refining & Pipe Line Co., 5 Cir., 280 F. 2d 257, 262, 263;
Scot Typewriter Co. v. Underwood Corp., supra, at 865;
See also: Egan v. American Airlines, Inc., 324 F. 2d 565, 566; Kelly v. United States Steel Corporation, 3 Cir., 284 F. 2d 850, 854.

under the direction of its Vice President, who maintains an office at New Haven, Connecticut.

The Development Division is operated out of an office in White Plains, New York, and has a facility in White Plains and another in Pawling, New York. It is engaged in nuclear research and development for the United States Government, the development of commercial nuclear power plants for maritime use, for water desalting and small electric generating stations, and other projects involving advanced technology, and has classified contracts with space and defense agencies. It is operated under the direction of a Vice President in charge of Development.

The Chemical Division, located in Missouri, is operated under the direction of the Vice President in charge of the Fuels Division. It maintains a plant in Hematite, Missouri, which processes fuel for reactor cores out of enriched uranium, and for reprocessing scrapped uranium.

The Shielding Division is operated by a wholly-owned subsidiary, Ray Proof Corporation, the plant or office of which is located at Stamford, Connecticut, and is under the direction of the President of such subsidiary. It produces standard industrial products for shielding against X-ray and Gamma radiation, radio frequency vibration, and acoustic interference.

Up to the middle of 1963, Nuclear maintained its principal executive offices at White Plains, New York. In August, 1963, it moved its principal executive offices to Centreville, Maryland. The situs of the Maryland executive offices of Nuclear is a farm of approximately 1,700 acres, owned by it. The President and Chief Executive Officer and the Vice President and Treasurer live in homes owned by Nuclear and situated on such farm. The Senior Vice President and the Vice President in charge of Administration reside in Centreville. All of such executives have offices in an office building owned by Nuclear and located on such farm.

The executive headquarters at Centreville is the hub where corporate policies are formulated and important corporate contracts are finalized, and from which supervision and

direction emanate, to be conformed to and carried out by the local managers of the several divisions.

Offices are also maintained in New York City, formerly the corporate headquarters of Nuclear. They are in charge of the Chairman of the Board of Nuclear.

The 1962 Annual Report of Nuclear lists 14 persons as officers of the corporation, including the Chairman of the Board, the President and Chief Executive Officer, the Executive Vice President, eight Vice Presidents, a Secretary and a General Counsel. That report and the 1963 Annual Report of Nuclear show that only one of its corporate officers, the Vice President of the Mining and Milling Division, lives and works in New Mexico.

A majority of the employees of the corporation live in states other than New Mexico.[10]

The product of the Mining and Milling Division is sold to the Atomic Energy Commission and is delivered to it in Missouri. All of the proceeds of such sales are paid directly to the Chase Manhattan Bank in New York and the Mining and Milling Division receives only that part thereof required by it to carry on its operations. Sales to the Atomic Energy Commission differ from ordinary sales. The Mining and Milling Division does not require and does not maintain a highly organized and trained sales force, as do the other divisions that engage in the sale of products. The principal marketing office is located in Washington, D. C. Corporate tax returns are filed in Maryland. Publicity and public relations activities are handled from New York. Pension and profit sharing plans for all

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[10] Counsel for Nuclear contend that a majority of its employees live in New Mexico. Their contention would be correct if the employees of the Homestake-Sapin Partnership are employees of Nuclear. In that partnership, Nuclear is a limited partner. Homestake-Sapin is a separate entity from Nuclear. Nuclear does not control the employees of the partnership. They should not be regarded as employees of Nuclear. Moreover, the location of a majority of the employees would be only one element to be considered in determining the principal place of business of Nuclear.

employees, except those in the Mining and Milling Division are directed from the New York office.

From April 1, 1962, until the date of the filing of this action, August 2, 1963, six meetings of Directors of Nuclear were held. Of these, one was called for a meeting in New Mexico on September 21, 1962. It had to be recessed for lack of a quorum. The remaining five directors' meetings were held in New York City. In that same period, six meetings of the Executive Committee of Nuclear were held. One was held in New Mexico, the other five in New York City.

In the light of the foregoing facts and the deductions which may reasonably be drawn therefrom, we do not think it can be said that the trial court erred in finding that the principal place of business of Nuclear was not located in New Mexico, or that it erred in its conclusion of law that the court had jurisdiction of the action.[11]

Affirmed.

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[11] It was not necessary for the court to decide in what other state than New Mexico Nuclear had its principal place of business.

Unger v. Del E. Webb Corporation, D.C.N.D. Cal., 233 F. Supp. 713, 715;

Textron Electronics, Inc. v. Unholtz-Dickie Corporation, D. C. Conn., 193 F. Supp. 456, 460.

However, we think the evidence established that the principal place of business of Nuclear was located in Maryland.